IN THE MATTER OF SIM BEE SAWMILL CO. SDN. BHD.

v.

KOH CHIN WOOI & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[COMPANIES WINDING-UP NO. 42-23-88]
25 NOVEMBER 1988

CIVIL PROCEDURE: *Injunction granted in ex-parte application - Inter parte application to set aside the injunction - Whether serious question to be tried - Balance of convenience - Non disclosure of material facts.*

M/s. Sim Bee Sawmill Co. Sdn. Bhd. ("the company") was to hold an extra ordinary general meeting for adopting a resolution that the company is to purchase a piece of land belonging to the chairman of the company, Mr Lee Chee Hooi for a consideration of RM749,553.38 and that Mr. Lee Chee Hooi be alloted 440 shares belonging to the said company, and be paid RM50,000 in part satisfaction of the purchase price. The balance sum due from the company to Mr Lee Chee Hooi to be treated as an interest free debt due from the company to Mr Lee Chee Hooi.

The petitioners are minority shareholders of the company, who initiated winding-up petition under s. 181 of the Companies Act. The petitioners were granted an injunction restraining the company from holding an extraordinary general meeting. The company applied to dissolve the said injunction.

Held:

[1] The petitioners have shown that there is a serious question to be tried, in that the petition is not frivolous or vexatious.

[2] The balance of convenience lies in favour of the interlocutory injunction remaining in force. If the petitioners are successful in their petition for winding-up, there would be insurmountable difficulty in quantifying the loss suffered by them as shareholders of the company.

[3] The petitioners have rebutted the allegation of non-disclosure in their joint-affidavit in reply.

[Application dismissed with costs.]

Case referred to:
First Nominee (Pte) Ltd. v. New Kok Ann Realty Sdn. Bhd. & Anor [1983] 2 MLJ 56

Legislation referred to:
Companies Act 1965, s. 181

For the respondent/applicant - K. Balasundaram; M/s. Balasundaram & Co.
For the petitioners/respondents - Yeoh Chin Chong; M/s. B.C. Teh & Cheah

JUDGMENT

Mohamed Dzaiddin J:

This is an application on the part of Sim Bee Sawmill Co. Sdn. Bhd. ("the company") to set aside the order of injunction granted by this Court on 20 July 1988 to the petitioners restraining the company from holding a general meeting and adopting any resolutions until

further orders. In addition the company seeks a further order that upon the dissolution of the injunction a general meeting of the company be called to consider and pass the resolutions embodied in the notices of extraordinary general meeting sent to the shareholders of the company.

The petitioners in this winding-up petition are the minority shareholders of the company, which was incorporated in Malaysia with registered address at No. 4077, Permatang Pauh Road, 13400 Butterworth, Seberang Perai. The complaint of the petitioners was that on or about 23 September 1987 the company purportedly acquired a piece of industrial land known as plots 167, 168 and 169, Section 3, Town of Butterworth ("the said land") belonging to Mr. Lee Chee Hooi, the chairman of the company for a consideration of RM749,553.38 payable to the chairman partly by shares of the company and partly by cash which was deemed to be a loan from the chairman. The purchase was approved by the board of directors during the board meeting on the same day. The petitioners were dissatisfied with the said purchase and challenged its validity under s. 132C of the Companies Act 1965 ("the Act") in that the said acquisition was not approved at a general meeting in accordance with the Act. In addition, they alleged that the acquisition price was higher than the market value. The petitioners also believed that the issue of additional shares for the purpose of the said acquisition did not comply with s. 62 of the Act. Lastly, they said that the current earnings of the company did not justify an increase in the share capital nor an increase in the company's liabilities. Hence, the petitioners contended that the purported acquisition would adversely affect the financial position of the company and dilute the voting powers of the minority shareholders.

On 6 July 1988, the chairman, Mr. Lee Chee Hooi, who holds 842 shares in the company convened a directors' meeting for the purpose of considering resolutions stated in the notice to be recommended to an extraordinary general meeting for adopting the following resolutions:

(1) That the purchase by the company of the land known as Lot No: P.T. PJNK/JJ/2681/108; PBD/69/63 held under H.S.(D) 691, Section 3, Bandar Butterworth, Daerah Seberang Perai Utara, Pulau Pinang for a consideration of RM749,533.38 from Mr.Lee Chee Hooi and the terms of payment thereof as approved by board on 23 September 1987 be hereby approved, ratified and confirmed;

(2) That in pursuance of the agreement reached between the company and Mr. Lee Chee Hooi the allotment of 440 fully paid up ordinary shares of RM1,000 each in the company in part satisfaction of the purchase price of RM749,553.38 agreed to be paid by the company to Mr. Lee Chee Hooi by the board on 23 September 1987 be hereby approved, ratified and confirmed;

(3) That in pursuance of the agreement reached between the company and Mr. Lee Chee Hooi the sum of RM50,000 paid by the company in part satisfaction of the purchase price of RM749,553.38 agreed to be paid by the company to Mr. Lee Chee Hooi by the board on 23 September 1987 be hereby approved, ratified and confirmed;

(4) That in pursuance of the agreement reached between the company and Mr. Lee Chee Hooi, the balance sum of RM259,553.38 due from the company to Mr. Lee Chee Hooi and agreed by the board on 23 September 1987 to be treated as an interest free debt due from the company to Mr. Lee Chee Hooi and payable in instalments at such time and manner to be mutually agreed upon by the company be hereby approved, ratified and confirmed;

(5) That pursuance to resolution 1, 2, 3, & 4 above the secretary be authorised and directed to file such returns and amended returns, if any, and such other documents and register the same with the Registrar of Companies and generally do and take such other steps as may be necessary to give effect to and validate the transactions therein referred to;

(6) That the company's solicitors be authorised and directed to take all such necessary steps and proceedings including Court proceedings to give effect and validity to resolution 1, 2, 3, and 4 above and in particular to seek Court sanction and validation in respect of any of the transactions therein referred to which may be or have been *ultra vires* the powers of the directors, the company or in contravention of any of the articles of the company or provisions of any written law and for the purpose herein the managing director nominated by him be authorised to give such instructions to the company's solicitors and sign, execute and affirm such documents as may be necessary for the aforesaid purpose.

The said extraordinary general meeting to consider the above resolutions was scheduled to be held on 28 July 1988. However, because of the injunction which was granted on 20 July 1988 no meeting was held. In the result, the company applied for the said injunction to be dissolved.

The grounds for the discharging the said injunction are found in the supporting affidavit of Lee Eng Joo (encl. 10), the managing director of the company. Before considering the submissions of Counsel, let me briefly state the gist of Mr. Lee's affidavit. First, in reply to the allegations of the petitioners regarding the purchase of the said land, he placed the following facts on record. The said land was initially acquired by the chairman in his own right sometime in the early 1950s at about the same time when the company acquired the land upon which the sawmill and other premises were built. The said land is immediately adjacent to the company's sawmill. A portion of the said land has for the past 20 years been utilised by the company with the chairman's permission for storing timber logs and dumping of timber waste from the company's sawmill. No rental was ever paid to the chairman. The company felt that the existing premises are not adequate and as the said land has been used by the company for storing logs, there was a need to purchase the said land. The need arises because of the existing turnover in the company's business and its present healthy financial situation. Further, the company, is in a position to extend its operation and to put up new structures for physical extension of the sawmill.

Mr. Lee also deposed that the purchase price was based on the open market value of the said land which was based on the valuation report of Messrs. Collins, Jordan Lee & Jaafar Sdn. Bhd. dated 22 August 1987. In fact, according to Mr. Lee, three of the petitioners attended the directors' meeting held on 23 September 1987 and participated in the proceedings therein where it was resolved that the company acquired the said land for the consideration stated therein. None of them objected to the said transaction. Subsequently two other meetings were held where three of the petitioners also attended and at these meetings the minutes of 23 September 1987 were affirmed by them. Again, two of them signed the share certificate for the issue of 440 shares. In the circumstances, the company felt that the petitioners are estopped by their conduct from challenging the validity of the transaction and the issue of the said 440 shares.

Mr. Lee further stated that the acquisition of the said land was for the benefit of the company. The rest of his affidavit contained submissions of law, which in practice should not be deposed in an affidavit.

The petitioners filed their affidavit in reply (encl. 130), adopting the facts stated in their petition for winding-up and traversing the allegations of Mr. Lee in his affidavit. Before commenting on the petitioners' affidavit, it should be noted that Mr. Lee Chee Hooi, the chairman of the company, also filed an affidavit affirmed on 26 August 1988 (encl. 12) where he referred to the various paragraphs of the joint-affidavit of the petitioners (encl. 3). In

essence, the chairman denied that the acquisition of the said land is *ultra vires* the Companies Act as alleged by the petitioners. He also denied that in conducting the affairs of the company or in the exercise of his powers as a majority shareholder, he had acted in an oppressive manner against the interest of the minority shareholders.

Going back to the affidavit in reply of the petitioners, their reply to Mr. Lee's affidavit may be summed up as follows. They maintained that the company's existing premises is sufficient for the company's present need. Hence there is no necessity for purchasing the said land. Secondly, the purported acquisition of the said land would adversely reduce the current net assets from RM526,496.17 to RM193,290.82. Thirdly, they say that the valuation report of the valuers was not an independent valuation. Fourthly, they maintained that the minutes of the directors' meeting of 23 September 1987 was misleading and incomplete as one of the petitioners, Tan Beng Chuan, had objected to the purported acquisition, but such objection was not recorded in the minutes. Again the minutes of the directors' meeting of 18 January 1988 and of 5 June 1988 were also incorrect because both Koh Chin Wooi and Lee Ee Luat were never the seconder nor proposer respectively in respect of the confirmation of the minutes. Therefore, the petitioners contended that the records of the minutes were inaccurate.

With regard to the signing of the share certificate for 440 shares, they complained that the two petitioners signed the certificate upon a misrepresentation given by the secretary and the said signing did not signify their consent to the purported acquisition of the said land.

Lastly the petitioners appeared to have raised an issue of fraud on the part of the chairman. They alleged that the notice of meeting (Exhibit "LEJ6") omitted to state that in part satisfaction of the purported acquisition of the said land, the chairman had also taken from the company a sum of RM55,000 apart from the sum of RM50,000 paid earlier. They said that this omission manifested an intention to commit fraud on the shareholders. On another occasion, i.e. in May 1987, Mr. Lee used the company's shares from another shareholder Abu Bakar bin Abdullah.

Before I consider the submissions of Counsel, let me first appraise the matter, as I see it. First the petition for winding-up the company.

This petition is made under s. 181(1)(a) of the Act - that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members i.e. the petitioners.

Under para. 2, if on such application the Court is of the opinion that the above ground is established the Court may, with the view to remedying the matters complained of make such order as it thinks fit, under any of para. 2(a) to 2(c) of s. 181. In the present petition, the petitioners pray for any of the following orders:

a) that the said acquisition and issue of shares be cancelled;

b) further or alternatively that the chairman do buy up the rest of the shares of the company from the other shareholders;

c) further or alternatively that the company be wound up and provisional liquidator of the company be appointed by the Court.

Secondly, the purpose of the injunction which was granted on 20 July 1988 was to prevent the company from proceeding with its extraordinary general meeting which was scheduled to be held on 28 July 1988 for the purpose of adopting the various resolutions passed at the board of directors meeting on 6 July 1988. It is clear that the most crucial resolution was the

approval of the purchase of the said land by the company from the chairman upon the consideration and terms, which the petitioners alleged to be *ultra vires* the provisions of the Act; that such acquisition adversely affected the financial position of the company and further dilute the voting powers of the minority shareholders; and that the chairman had in the circumstances acted for his own personal interest rather than the interest of the company as a whole. The sum total of the petitioners' grievance is that the affairs of the company are being conducted by the chairman in a manner oppressive to the interest of the minority shareholders, and therefore the Court should exercise its powers under s. 181 of the Act by granting an order prayed under any of the three prayers in para. 20 of the petition. Therefore, before the petition is heard, the petitioners say that they should be protected in the sense that the company should be prevented by an injunction from convening any extraordinary general meeting to be held for the purpose of passing various resolutions concerning the purchase of the said land.

Based on the submission of Mr. Balasundaram, Counsel for the company, I find the company's case for dissolving the *ex parte* injunction are founded on the following grounds. First, bearing in mind that the crux of the petitioners' application under s. 181 of the Act concerned the purported purchase of the said land, the company conceded that it was in breach of s. 132C, D and E of the Act in that no approval of the company in general meeting had first been obtained. Counsel submitted that it was for this very purpose that the company proposed to hold an extraordinary general meeting to rectify and validate the purchase of the said land and the issue of 440 shares as part consideration. Counsel relied on s. 63, where the Court may upon application made by the company and upon being satisfied that in all the circumstances of the case, it is just and equitable so to do make a validating order confirming the allotment of the 440 shares. Counsel also relied on s. 355(3)(a), where the Court is empowered to rectify any defect, error or irregularity or to validate any act or matter rendered or alleged to have been rendered invalid by or as a result of any defect, error or irregularity. Counsel contended that the injunction was obtained with the sole purpose of obstructing the company from complying with the above provisions of the Act.

Secondly, it was submitted that there was non-disclosure of material facts on the part of three petitioners who are directors of the company. Counsel alleged that they attended the board meeting on 23 September 1987 which approved the purchase by the company of the said land from the chairman. The minutes of the meeting was confirmed at a directors' meeting on 18 January 1988 which was again attended by the three petitioners. The other material fact concerned the signing of the 440 Share Certificate No. 037 by two of the petitioners. Counsel submitted by their conduct at these meetings and as signatories of the share certificate, they are estopped from raising this issue in the petition. Furthermore, non-disclosure of material facts is a good ground for the discharge of the *ex parte* injunction as it was not applied in the utmost good faith.

Thirdly, Mr. Balasundaram submitted since the grounds raised by the petitioners in their affidavit for the granting of the injunction can be validated under the provisions of the Act which he had referred to above, he concluded that not only have they failed to prove "oppression", but the company has succeeded in proving to the Court that there is no serious question to be tried.

Mr. Cheah, for the petitioners maintained the acquisition of the said land was not for the benefit of the company. The purported acquisition of the said land has reduced the net current assets of the company. Counsel referred to para. 6 of the petitioners' joint-affidavit (encl. 13) on this point. On the question of validation order under s. 63 and s. 355(3) (a), Counsel

relied on *First Nominee (Pte) Ltd. v. New Kok Ann Realty Sdn. Bhd. & Anor.* [1983] 2 MLJ 56. Mr. Cheah pointed out that the question of non-disclosure of material facts did not arise because the allegation of the company against the three of the petitioners were denied and disputed by them in their affidavit (encl. 13 para. 8 and 13). To sum up, Counsel submitted that there are serious questions to be tried and the balance of convenience lies in favour of the petitioners.

After considering the submission of Counsel, I am now left to consider whether or not, in the light of what had been presented before me, I should dissolve the *ex parte* injunction granted on 20 July 1988. Like most cases, my decision is guided by the principles enunciated by Lord Diplock in the *American Cyanamid*. The first question to be answered is: Are there serious questions to be tried? On this point, I have to fall back on the petition for winding up. It is a petition for relief under s. 181(2) (a), (c), and (e) on the ground of para. (1)(a) of the same section. By their supporting affidavit (encl. 3), I am satisfied that the petitioners have shown that there is a serious question to be tried in the sense that the petition is not frivolous or vexatious. The several points raised by Mr. Balasundaram based on the affidavit of Mr. Lee Eng Joo (encl. 10) are issues connected with the petition which at this stage are not pertinent for serious discussions. In fact, these are issues of law which should be dealt with at the winding-up stage. As stated earlier, the crux of the matter relates to the purported acquisition of the said land. It is for the petitioners to show at the hearing of the petition that the act of the chairman is an oppression on the minority shareholders and that the Court should grant the relief sought under s. 181 (2) of the Act. Suffice at this stage for the petitioners to show that there is a serious question to be tried. In fact, they need only show that they have an arguable case.

Secondly, I find that the balance of convenience lies in favour of the interlocutory injunction remaining in force. If the petitioners are successful in their petition for winding-up, there would be insurmountable difficulty in quantifying the loss suffered by them as shareholders of the company. It is clear the issue in the petition is not money judgment or quantum of damages but the protection of the right of the minority shareholders. On the other hand there is no difficulty in quantifying the company's loss in term of damages suffered by continuing with the interlocutory injunction. In fact, it only amount to a postponement of the extraordinary general meeting until the final disposal of the petition. There is no question of the land being sold to other purchasers or the Chairman was in need of money. Therefore taking all these considerations into account, in my opinion, the *status quo ante* should be preserved.

On the question of alleged non-disclosure of material facts, I am satisfied that the petitioners have rebutted the allegation in their joint-affidavit in reply.

In the circumstances, I dismiss the company's application with costs. I order the injunction to remain until the final disposal of the petition. An early date for the hearing of the winding-up petition be given, on application by the parties.

Also found at [1989] 2 CLJ 435